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IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

No. 823.

AMERICAN-WEST AFRICAN LINE, INC. and BARBER STEAMSHIP LINES, INC.,
Petitioners,
(Claimant and Respondents-Appellants Below)

against

"HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others,
Respondents.
(Libellants-Appellees Below)

(CONSOLIDATED CAUSES)

BRIEF OF RESPONDENTS, "HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Statement.

Petitioners seek review of the findings and decree in admiralty of the Circuit Court of Appeals for the Second Circuit as set forth in the opinion of Judge Swan and concurred in by Judges Augustus N. Hand and Chase on January 5th, 1944, 139 Fed. (2d) 748 (R., pp. 1269-1273),

affirming the opinion and findings of Judge Murray Hulbert, United States District Court for the Southern District of New York, 49 Fed. Supp. 945 (R., pp. 1189-1203, 1204-1224). The decisions of both Courts below almost exclusively dealt with factual issues and were in complete accord.

Facts.

Some of the pertinent facts not emphasized in petitioners' statement are as follows:

The severely heavy weather encountered by the *Otho* did not commence until midnight of January 11th, 1941; but the No. 1 hold began making water eleven days earlier on December 30th, 1940, and notwithstanding daily special pumping of the bilges, water continued to enter the compartment throughout the quite moderate weather encountered during the interim. That the water was coming from the fractured H 3 plate is plainly indicated by the Chief Engineer (f. 1209) and the ship's hull expert Haight (ff. 2247-2250).

The foredeck of the *Otho* was awash during the day of January 11th, 1941 (f. 1517; Log Book Ex. W), and the pumps were working continuously on No. 1 hold throughout that day,—and thereafter until arrival at New York.

Accordingly, the fracture had first occurred during the calm weather of the early days of the voyage, and thereafter lengthened with the normal working of the ship until by the morning of January 11th, 1941, sufficient weight of water was in the hold to keep the decks awash and cause the vessel to lose her buoyancy, become sluggish and less manageable (ff. 1475-1478). While the District Court on the ship's own contradictory evidence found the *Otho* was first definitely *observed* to be "down by the head" on January 13th, 1941, the testimony she was "sluggish" as of earlier

dates stands accepted by the Circuit Court of Appeals (Opinion, R., p. 1273).

The breaking adrift of the ship's launch and other damage mentioned by petitioners was on January 12th, 1941; —a full day after the water in the No. 1 hold had weighted her down until the fore decks were completely awash.

Discussion of the weather *after* the ship's difficulties had commenced and thoroughly progressed as a result of the weight of water in the No. 1 hold is accordingly superfluous.

The facts with respect to the lack of inspection of the *Otho's* No. 1 hold plating will be outlined *infra*.

Decisions and Findings Below.

The District Court held that the plate fracture occurred *prior* to the storm; and that the petitioners were liable for the cargo damage on the ground it was caused by the ship's unseaworthiness resulting from a lack of due diligence. Clarifying the opinion Judge Hulbert's Findings of Fact Nos. 56, 71 and 72 (ff. 3650, 3659-3660), and Conclusion of Law No. 8 (f. 3666) ruled that *all* of the damage described in the libels, whether in No. 1 hold or elsewhere, "was *caused* by the unseaworthiness of the *S. S. Otho* resulting from respondents' (petitioners') failure to exercise due diligence to ascertain the unseaworthy condition of the vessel existing at the commencement of the voyage".

The opinion of the Circuit Court of Appeals unreservedly affirms the District Court; evidences thorough and careful study of the Record and states grounds for its affirmance that are additional to those mentioned by the Trial Court. Petition for re-hearing was denied.

Following the well settled doctrine of this Court, the concurrent decisions of the two Courts below upon questions of

fact should not be disturbed unless clearly erroneous (*The Carib Prince,* 170 U. S. 655, 658, and cases there cited).

Summary of Argument and Reasons for Denying the Writ.

The petition and brief constitute almost wholly a reargument of the facts, and do not develop the character of reasons usually considered by this Court as grounds for granting certiorari.

Reply to Petitioners' First Point.

While petitioners' First Point devotes ten pages to factual argument it is only the last five paragraphs (pp. 26-27) that mention one of the customary grounds for consideration of an application for a writ of certiorari, i.e. an alleged conflict of decisions between Circuits.

It is asserted the Fifth and Eighth Circuits are in conflict with the Second and Third Circuits "as to the effect to be given to a trial court's findings on appeal" (Brief, p. 26). Review of the cases cited indicates Petitioner's very minor distinction is wholly without a difference. The Eighth Circuit case, *State Farm Mut. Automobile Ins. Co.* v. *Bonacci, et al.,* 111 Fed. (2d) 412, 415, states that the rule covering the effect to be given a trial court's findings of fact "plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings", and "if the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses". The Court adds that the findings of fact are "presumptively correct" although not conclusive "if against the clear weight of the evidence". The authority

for the Eighth Circuit's explanation of the rule is quoted from this Court's decision in *Kellar* v. *Potomac Electric Co.*, 261 U. S. 428, as follows:

> "In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."

In the instant case the opinion of the Court below manifests thorough review of the testimony and a decision that the *weight of the evidence* clearly substantiated the findings of the Trial Court. On the question of diligence it characterized the inspections of Petitioner's maintenance officials as being "plainly" such as would not discover the defect in the plate which later fractured, and says the inspection of the American Bureau surveyors was even less adequate in that no inspection at all was made of the interior side of the plating in No. 1 hold,—where the corrosion grooves were later found. The Circuit Court's opinion stated *added grounds* for disbelief of the testimony of Capt. Paul and Chief Officer Printzlau concerning their alleged examination of the ship's interior plating.

With such analysis of the testimony Petitioner was thus left without *any* competent inspection of the dilapidated areas of the plating. There can be no other conclusion but that the Court below considered, and meant by its opinion, that Judge Hulbert's findings were in fact supported by the *weight of the evidence* rather than by merely a few odd bits of testimony here and there as seems to be petitioners' contention.

It appears to these respondents that the Circuit Court in the case at bar is not in conflict with the Eighth and First Circuits, but on the contrary has applied the rule and given effect to the requirements thereof in exactly the same fashion as discussed by the two latter circuits. It is clear the Court below was of the view that the findings of the District Court were not *against* the weight of the evidence as was the decision of the Appellate Court in *Fleming* v. *Palmer*, cited by petitioners.

While not within the character of reasons generally considered by this Court upon petition for writ of certiorari, the petitioners appear aggrieved by reason of an adverse decree in the instant case as against a favorable one in *The Zarembo*, 44 Fed. Supp. 915 (E. D. N. Y.); 136 Fed. (2d) 320 (C. C. A. 2). It is claimed, although not conceded by these respondents, that the two cases are practically on all fours. In opposing the appeal in the *Zarembo* case petitioners relied upon the same rule in urging upon the Circuit Court of Appeals that the District Court's findings of fact there should not be disturbed on the ground they were not clearly erroneous.

While it is true the *Zarembo* casualty resulted from a fractured plate in No. 1 hold, the District Court attributed such fracture to extremely heavy weather encountered by the vessel amounting to a peril of the sea within the exceptions of the bills of lading and Carriage of Goods By Sea Act, and finding further that due diligence had been used, the libel was dismissed. In the case of the *Otho*, however, the defective plate fractured in calm weather ten days prior to the heavy weather commencing in the late evening of January 11th, 1941. Accordingly, the issue of sea peril is eliminated in the instant case.

Petitioners endeavor to make a favorable comparison between the diligence exercised with respect to the *Zarembo*

as against the lack of inspection of the *Otho*. In making such comparison Petitioners again rely on the discredited testimony of Capt. Paul and Chief Officer Printzlau which has already been discussed. Aside from such discredited testimony, and that of the master, there was no examination, inspection or testing, with hammer, scraping or otherwise, of the inside shell plating of the *Otho*. If there was a diligent inspection of the *Zarembo* certainly the same may not be said of the *Otho*, and any comparison is therefore worthless.

Moreover, it is not admitted or established that the condition of the *Zarembo* plate prior to the voyage was in fact of the same appearance as the *Otho* plate, and while there may be some similarity between the type of fracture in the two cases, they are far from being on all fours on the questions of diligence, sea perils or the time element.

Petitioners (Brief, p. 21) touch but lightly upon a cautioning circular issued to the American Bureau surveyors on May 20th, 1937, which is quoted in Judge Hulbert's opinion (ff. 3599-3602). There is a failure to mention, however, that as a result of the fracture of the *Zarembo* plate such circular was immediately (April 1941) re-issued,—again cautioning the surveyors to exercise still greater care in searching for the corroded condition existing along the longitudinal frames of Isherwood designed ships. The *Otho* sailed within nine months after the *Zarembo's* difficulties and within six months of the re-issue of the cautioning circular, yet it is admitted that neither the *Zarembo's* trouble nor the circular were in any way instrumental in occasioning any greater degree of diligence than had theretofore been used. On the contrary, it is clearly evident by the decisions of the Courts in both causes that the inspections of the *Otho's* No. 1 hold plating were far less diligent than those enumerated by the District Court in the *Zarembo* case.

Discovery of the corroded gutters or grooves eating three-quarters of the way through the ship's shell plating, is not, as asserted by petitioners (Brief, p. 21) a baffling problem. The diagram, attached to the American Bureau's circular (Hill Ex. 5, R., p. 1149) graphically illustrates the condition and the ease of discovery thereof. As mentioned by the District Court, surveyor Narter, upon completion of the voyage, located numerous other similarly corroded plate areas merely "by searching out with my flashlight used as a guide and then using my hammer and digging around along the heels of the longitudinal frames". Narter testified that his inspection after the voyage would have discovered the defective conditions without respect to whether or not water had been in the hold for the few days prior to arrival at New York (f. 1152).

As to petitioners' discussion of Tour's testimony (Brief, p. 25) the Circuit Court of Appeals finds the witness' testimony exactly contrary to petitioners' interpretation (R., p. 1271).

Respondents submit that petitioners' First Point fails to present any grounds or reasons which this Court customarily considers when reviewing an application for a writ of certiorari.

Reply to Petitioners' Second and Third Points.

These points involve seawater damage to cargo in the No. 2 'tween decks, lower hold, bridge deck space, and the palm oil remaining in the deep tanks after jettisoning of 870 tons thereof on January 13th, 1941, and sweat damage in the No. 2 compartments. Compared to No. 1 hold the total of these damages involve comparatively little and particularly the sweat damage amounts to a few hundred dollars only.

Petitioners question the findings of the Courts below that the damage was caused by unseaworthiness resulting from want of due diligence rather than by a peril of the sea and maintains it was respondent's burden to show a causal relation between the unseaworthiness of the *Otho* and the cargo damage exclusive of No. 1 hold. Upon the inaccurate factual assumption that the Courts below found no such causal relation petitioners thereupon discuss some inapplicable decisions.

The inaccuracy of the argument is demonstrated by the fact that the District Court did rule, and was affirmed by the Circuit Court of Appeals, that *all* of the damage described in the libels "was *caused* by the unseaworthiness of the *S. S. Otho* resulting from respondent's failure to exercise due diligence to ascertain the unseaworthy condition of the vessel existing at the time of commencement of her voyage" (R., p. 1222 f. 3666), and the Findings of Facts Nos. 56, 71 and 72 (ff. 3650, 3659-3660) reiterated the holding. Proximate cause and causal relation is therefore established and no argument on the point of law is required.

Petitioners blandly state (Brief, p. 28) that the *Otho* "was observed to be acting sluggishly" on January 13th, 1941, and states further in the same paragraph that if she had "gone by the head" earlier her officers, of course, would have noticed it. Neither the record nor the decisions of the Courts below support such assertion.

Had the *Otho* on January 11th, 1941, not been heavily weighted with water in the No. 1 hold and therefore sluggish and non-buoyant, there is not the slightest indication in the case that the ventilators, motor launch or other equipment would have been broken adrift by the seas, nor that the bridge deck doors would have been sprung to some extent on the following day. Such was the view of

Judge Hulbert and the Circuit Court of Appeals (C. C. A. Opinion, R., p. 1273).

Accordingly, the seawater damage in the bridge deck, deep tanks and the No. 2 cargo compartments traces directly back to the fractured plate, and establishes the unseaworthiness as the proximate cause of all of the damage, and its causal relation to the unseaworthy condition.

Concerning the seawater damage to the peppers stowed in the bridge deck space of the *Otho*, Petitioners say no more than that the doors leading to that compartment were sprung by the heavy seas. There is not, however, even the slightest evidence with respect to the condition of the bridge deck doors prior to the voyage nor whether the rubber gaskets customarily used were in a proper condition to make the doors watertight, nor is there any evidence in the case explaining why water seeping through the sprung (if that be the fact) doors did not find its way to the scuppers, if any (ff. 1294-1296), another failure of proof. If the cargo in the bridge deck was properly dunnaged, water entering in such small quantities should have drained to the scuppers, assuming any were there and functioning properly. Petitioners may not leave open and unproved the proper condition of the ship to receive and carry her cargo, and as the shipowner has the burden of establishing both the primary and secondary causes of damage and due diligence with respect to such causes, the complete failure of any proof thereon entitled libellants to a decree.

As to the sweat damage in No. 2 'tween decks or holds, the seawater entering the cargo space created excessive atmospheric moisture necessarily resulting in condensation of sweat. So it was held by the Second Circuit in *The Asturias*, 126 Fed. (2d) 999, in affirmance of Judge Hulbert's District Court opinion, 40 Fed. Supp. 168. Moreover, there

were only three ventilators leading to the No. 2 compartment but assuming that was enough there is no evidence ventilation of the cargo space was augmented by the opening of the hatches during any part of the voyage when, in fact, calm weather was being encountered; in fact there is square admission to the contrary (ff. 1852-1854). So it must be assumed there was sweat in the space even before the seawater entered. It has been so frequently held that the use of such means is required to augment normal circulation of air through the ventilators that citation of extensive authorities is hardly needed (*The Vallescura*, 293 U. S. 296).

Notwithstanding the No. 2 hatch tarpaulins were torn and the bridge deck doors sprung on January 12th, the Courts indicated, and it seems indisputably established, that such damage was either wholly, or to a major extent, caused by the fact the entire fore deck of the *Otho* was completely and almost continuously under water from the morning of January 11th until arrival in New York on January 17th. Any heavy weather after January 11th, therefore, merely increased the ship's difficulties originating with the fractured plate.

It is accordingly not necessary further to discuss the "causal connection" doctrine of *The Isis* and the unauthoritative brochures referred to in petitioners' brief.

Basic error in petitioners' argument lies in the mistaken interpretation of the District Court's opinion to the effect that "presumably a sea peril was the first cause of this damage and that subsequently the damage was aggravated when the ship went by the head" (Brief, p. 30), and petitioners' suggestion that "it was the sea peril which first paved the way for the water to enter the No. 2 hatch, the bridge deck and the deep tanks" (Brief, p. 34). Neither of the lower Courts speak of *aggravation* of the damage as a

result of the ship going by the head. The decisions attribute the damage *initially* to the sluggishness caused by the weight of water in the No. 1 hold resulting from the fractured plate.

The District Court has not distinguished between the salt water damage in No. 2 hold and the sweat damage therein. Finding No. 71 ascribes the sweat damage to excessive atmospheric moisture created when seawater entered that space as a result of damage to the ventilators, and such damage to the ventilators was attributed to the unseaworthiness. If the sweat was thus attributable to the unseaworthiness so must have been the salt water which caused the sweat. In advancing such argument Petitioner sees fit to overlook entirely the District Court's conclusion that *all* of the damage described in the libels was caused by the ship's unseaworthiness.

Inasmuch as respondents showed and as the Courts below found that the *Otho* was sluggish, lacked buoyancy, and was unmanageable prior to January 12th, petitioners' argument with respect to the burden of proof (Brief, pp. 32, 33, 34) needs no reply.

By reason of the inapplicability of the legal points argued under the cases cited in petitioners' brief, there is no conflict between the decision below and those of this Court.

Reply to Petitioners' Fourth Point.

Having in mind the District Court's conclusion that *all* of the damage described in the libel was caused by the unseaworthiness of the *Otho* resulting from a want of due diligence, it would again appear petitioners' argument under Point Four is inapplicable. Petitioners state (Brief, p. 38) that "under the cases we have cited (pp. 32-33) they (respondents) must show that the unseaworthiness caused

their damage." The Court has so found and that would seem to end the matter.

Moreover respondents are at a loss to reason out any sound basis upon which the *Vallescura* doctrine should have any different application to a contractual exemption permitted by statute (Carriage of Goods by Sea Act) than it would under an exactly similar exemption contained in a bill of lading contract of a common carrier prior to the Act.

With respect to burden of proof, this Court, *subsequent to the passage of the Carriage of Goods by Sea Act*, has again pointed out the applicability of the *Vallescura* rule in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 109 (1941) by saying:

> "For this reason, the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, *whether imposed by statute or because he is a common carrier* or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. *The Edwin I. Morrision, supra*, 211; *The Majestic*, 166 U. S. 375; *Schnell* v. *The Vallescura, supra; The Beeche Dene*, 55 F. 525. Cf. 39 Stat. 539, 49 U. S. C. §88; Uniform Bill of Lading Act, §12. See IX Wigmore on Evidence (3rd ed.) §2508 and cases cited. And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. *The Folmina*, 212 U. S. 354, 363; *Schnell* v. *The Vallescura, supra*, 306, 307." (Emphasis ours.)

Likewise the doctrine of *The Vallescura* has just recently been applied by the Circuit Court of Appeals for the Second Circuit in *Pioneer Import Corporation* v. *The Lafcomo*, 138 Fed. (2) 907, 908; and certiorari was denied on January

31, 1944, to the same proctors as are appearing here for petitioners.

Reply to Petitioners' Fifth Point.

Petitioners (Brief, p. 39) suggest the District Court left unclarified the brief reference in the opinion to an apportionment of the damages. On that question the Court's opinion reads:

> "There is also proof that because of high seas during the storm, and damage to the ventilators, a condition of sweat was produced which, to some extent affected the cargo. But the facts have not been sufficiently developed to enable me to make specific findings as a basis of an apportionment of the damages and the several causes contributing thereto."

It is, of course, evident the District Court referred merely to the possibility of some of the sweat damage having been caused by the increased moisture in the No. 2 compartment as the result of seawater having entered due to the unmanageability of the vessel, as against the possibility of some sweat having resulted from a prior condition or the subsequent closing of the ventilator openings by reason of heavy weather on January 12th and 13th. Petitioners state "The confusion was deepened by the Court's findings and conclusions, which remained unclarified in spite of our efforts to have them clarified." On the contrary the Court's findings do clarify the opinion by stating clearly that the sweat damage was attributable to the ship's unseaworthiness (Finding No. 71, R., p. 1220, f. 3660), and by Conclusion No. 8 (R., p. 1222, f. 3666) that all of the damage described in the libel was not due to the perils of the sea but to unseaworthiness resulting from a lack of due diligence.

By his findings and conclusions the Judge appears to have recognized that neither he nor any other authority

could establish a criterion under which the sweat damage attributable to the increased moisture due to the seawater in the No. 2 hold and which resulted from unseaworthiness, could be segregated from possible damage which may have been due to the necessity of closing the ventilators for the short period of heavy weather. The Appellate Court implied that if it was possible to establish that some of the sweat damage was due to normal closing of the ventilators by reason of heavy weather, such opportunity would still be open for proof as to the extent thereof before the Referee on damages. But the impossibility seems to have been recognized and indicated by the last sentence of the opinion reading: "The opportunity to make such apportionment, *if possible*, will still be open to the appellants upon the Referee's order for petition of damages".

But if there could be a yardstick or criterion for segregating the possible two types of sweat damage, such criterion would involve questions of fact to be settled by the Referee on proper proof by petitioner. The question is hardly one within the category ordinarily considered by this Court on a Petition for Writ of Certiorari.

Conclusion.

The petition should be denied.

Dated April 7, 1944.

Respectfully submitted,

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